THE HIGH COURT

[2021] IEHC 505

[2021 No. 570 JR]

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

– AND –

THE JUDGES OF THE [STATED PLACE] CIRCUIT COURT

RESPONDENT

– AND –

X and THE COMMISSIONER OF AN GARDA SÍOCHÁNA

NOTICE PARTIES

JUDGMENT of Mr Justice Max Barrett delivered on 15th July 2021

SUMMARY

This is an unsuccessful application for a lifting of the stay on the trial of Mr X* pending the determination of these judicial review proceedings. This summary forms part of the court's judgment.

** The relevant order inadvertently refers to "*a stay on the trial of **the Applicant**…*" [emphasis added]. The reference to "*the Applicant*" should be to 'the first-named Notice Party' and has correctly been treated by the parties as such. The court proposes to vary the order so that it reads correctly.*

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1. This matter was heard yesterday and the court is giving judgment today. It involves an application for the lifting of a stay on the trial of Mr X "*pending the determination of these* [judicial review] *proceedings*", which stay has been ordered by the judge of whom leave was sought (on 21st June) to bring the within proceedings. The leave judge has not to this time granted leave. Instead, he required that the respondent and notice parties be put on notice of the application for leave and has made matters returnable to 12th October next. This court has decided not to lift the stay that was granted by the leave judge. The reason for the overnight turnaround of this judgment is so that Mr X, who is, the court understands, desirous of having his trial proceed later this month, will be able to decide on an informed basis whether or not he wishes to appeal this judgment.

2. Counsel for Mr X, though challenging the basis on which leave was sought in the within proceedings, emphasised that he was not seeking to suggest that there had been wrongdoing on the part of counsel for the DPP when moving the *ex parte* leave application. In an abundance of fairness, the court wishes expressly to state the unqualified view of the court that none of the lawyers on the DPP's side did anything remotely wrong at the leave-seeking stage, either deliberately or inadvertently. Lest the foregoing be misconstrued to suggest that there was anything untoward in the bringing of this application, the court notes also that there was nothing untoward in the bringing of this application. In short, no criticism falls to be made of any of the lawyers on either side of these proceedings, and none is made.

3. On 21st June just gone, the leave judge heard an *ex parte* motion by counsel for the DPP for leave to bring judicial review proceedings in which the DPP intends to seek the following reliefs:

> "*(i)* *An order of* certiorari *by way of judicial review, quashing the orders of* [a stated Circuit Court judge] *dated 19th May 2021 and 2nd June 2021 made in* [stated proceedings]*...requiring the Applicant to disclose a copy*

hard-drive containing specified disclosure materials to Mr X's solicitor and/or his expert witness in a manner which would permit that material to leave this jurisdiction.

(ii) *A declaration to the effect that the Applicant…and the Notice Party Commissioner cannot be directed to disclose copy hard-drives containing specified disclosure materials to Mr X's solicitor and/or his expert witness in a manner which would permit that material to leave this jurisdiction.*

(iii) *An order staying the trial of the Applicant herein pending the determination of these proceedings.*

(iv) *An order of this Court staying the Circuit Court order to disclose the materials at issue, including an interim order to same effect, pending the determination of these proceedings.*

(v) *An order restricting the publication of the first-named notice party accused's name in connection with these proceedings, pending the conclusion of his trial for child pornography.*

(vi) *An order making provision for release of the DAR in relation to the Circuit Court proceedings dated 19th May 2021 and 2nd June 2021.*

(vii) *Such further or other order as this…Court shall deem just to make, including orders providing for the costs of the application*".

4. The order that followed on that leave application requires that the respondent and notice parties be put on notice of the application with the matter to be returnable to 12th October next. In addition, the leave judge made certain associated orders, including (i) an order under s.45 of the Courts (Supplemental Provisions) Act 1961 prohibiting the publication or broadcast of any matter relating to the proceedings which would or could identify Mr X (which order remains extant) and (ii) "*a stay on the trial of the Applicant herein pending the determination of these proceedings*", coupled with liberty on the part of the respondent to apply on 48 hours' notice to the applicant to vary or remove the stay order.

5. The 'Applicant' in the judicial review proceedings is the DPP, so the last-quoted portion of the order of the leave judge ought properly to state "*a stay on the trial of the first-named Notice Party herein pending the determination of these proceedings*" and the court proposes to vary the existing order so that it states matters so. All of the parties have correctly proceeded thus far on the basis that the order before the court should refer to 'the first-named Notice Party' and not "*the Applicant*". What has happened is a slight slip in the form of the order.

6. As usual, the *ex parte* application to the leave judge was accompanied by a comprehensive statement of grounds which states, *inter alia*, as follows:

> "*(i)* *The Notice Party is currently awaiting trial in relation to allegations dating from 6th October 2015 that he possessed 5182 images of child pornography images, six movies of child pornography, contrary to s.6(1) of the Child Trafficking and Pornography Act 1998. The trial is due to start on* [stated date]....
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> *(ii)* *The allegation encompassed in the criminal proceedings centres around a…computer on which the images were alleged to have been found and the Applicant prosecutor and the first-named party's solicitor have been engaged in protracted correspondence concerning disclosure. More specifically the said Notice Party's solicitor has requested disclosure of an exact copy hard-drive for the purposes of having it forensically examined. Given the nature of these allegations the Garda National Cyber Crime Bureau are involved and have possession of the laptop in question, which is an exhibit in the criminal case.*
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> *(iii)* *On 19th May 2021, after hearing submissions from both parties, the learned Circuit Court judge gave a direction to the effect that disclosure, including the alleged images and videos of child pornography, was to be furnished by portable hard-drive to an independent firm of forensic scientists who had been engaged by the Applicant to obtain a report in relation to this exhibit. The judge made this*

ruling notwithstanding the objections raised to this course via counsel for the Director.

(iv) *The stated justification for this order was stated in prior correspondence to the requirement for any visiting expert to self-quarantine following arrival into the State from* [stated jurisdiction]…*and both prosecution and defence were at the time working under the assumption that this would necessarily apply. The position expressed by* [Stated Name of Consultants]....*was that the usual inspection within the State would not be feasible under such conditions.*

(v) *In order to put evidence before the Court as to the Garda concerns in relation to the proposed order, this case was listed before the Circuit Court on 2nd June 2021 and the Court heard evidence from Detective Sergeant* [Stated Name]...*concerning his twofold difficulty with the order which the court had made: firstly, insofar as the transfer of the materials in question might technically constitute the exportation of such images or a 'possession' by those who might subsequently come into possession of them, matters which are declared to be offences under the terms of the Child Trafficking and Pornography Act 1998 and, secondly, because the Gardaí would lose effective control over these images once they left the jurisdiction.*

(vi) *As well as requesting the court to revisit the court's order with regard to disclosure on 2nd June 2021 the court was also asked to consider adjourning the trial which would have allowed the examination to occur outside the Covid restrictions, on the assumption that the pandemic eased in the meantime; this supplication was also resisted by the defence and was not acceded to by the Court.*

(vii) *On 2nd June 2021 the court proceeded to affirm the previous order that this disclosure should be furnished by way of a hard-drive and specified that this was to be done within 2*

weeks….[T]*he matters upon which the learned Circuit Court judge appeared to place most importance in making this order were his assessment that the contemplated disclosure would be lawful under the terms of the 1998 Act and the exemptions provided for in s.6 thereof; the fact that the proposed firm of experts was reliable and could be trusted to keep the exhibits securely and use them properly; and the presumption that the dispatch would not constitute a breach of* [stated jurisdiction]*…law. The court did not refer to the Applicant's concerns that any breach of the terms of the undertaking, whether accidental or deliberate, would no longer be amenable to Garda control once the exhibits had left the State.*

(viii) *The request for inspection in the present case is not at all unusual or exceptional and the applicant Director and Garda Commissioner frequently facilitate disclosure and inspection of this kind. An Garda Síochána are happy to accommodate inspection visits from experts at their facilities and usually do so without issue or complaint; however, it is established Garda policy that such sensitive exhibits as those at issue herein do not leave Garda controlled premises….*

(ix) *Between 2nd June and 9th June 2021, the parties engaged in correspondence concerning the possibility of the defence expert availing of exemption from self-quarantine, but this course was rejected by the defence solicitor who insisted on disclosure in compliance with the terms of the Court's previous order.*

(x) *On 10th June 2021, the defence solicitor sent to the Director's office correspondence from* [stated jurisdiction]*…concerning compliance with* [that jurisdiction's]*…laws, which appeared to ensure this aspect, subject to the appropriate memorandum of understanding being furnished.*

(xi) *On 15th and 16th June 2021, counsel on behalf of the Applicant herein again requested the Circuit Court to re-visit the terms upon which disclosure had been directed in light* [of] *the accommodation which had been offered and refused in relation to quarantine upon the arrival of a nominated expert from* [stated jurisdiction]*...as this was felt to permit reasonable access to the exhibits while at the same time ensuring the Garda's security concerns and procedures were upheld.* [Stated Circuit Court Judge]*...ultimately declined to entertain these submissions, referring to the finality of his previous order and indicated that it could be addressed elsewhere, if this was sought to be done.*

(xii) *It is accepted that the firm of* [Stated Consultants]*...have a well-deserved reputation in their field and that it is very unlikely as a matter of fact that this firm or any of its employees would intentionally do anything to jeopardise the security of this exhibit or permit access to the images beyond what is strictly necessary for the purposes of forensic examination. However, the Garda requirement that child pornography images which are furnished to defence experts by way of disclosure never leave Garda custody is one which is imposed on all such experts without distinction and reflects the requirement to have physical and legal control over the exhibits which are both lost once they leave this jurisdiction*.

(xiii) *Given the matters which are depicted, the Notice Party Commissioner owes a duty to the persons so depicted to ensure that there is no duplication or further circulation of these images beyond what is strictly necessary for the purposes of forensic examination. Separate to this duty, it is also a legitimate objective which is integral to the policing function that these materials are never to be used as a means by which further offences might be committed.*

Once the images in question leave the jurisdiction, the Commissioner loses the protection of the Irish courts to police compliance, access premises, or compel persons in pursuit of these legitimate policies and objectives, which are ultimately grounded in his statutory office and functions.

(xiv) *In terms in which it was stipulated, the direction to disclose is mandatory in its prescriptions as against the respondent Director and the Notice Party Commissioner and is equivalent in its effect to an order of the Circuit Court, whether or not so described.*

Legal Grounds

(xv) *In the circumstances as outlined the Circuit Court enjoyed no jurisdiction to order disclosure in the terms in which it did.*

(xvi) *Without prejudice to the generality of the foregoing, while the learned trial judge undoubtedly enjoys jurisdiction at law to order disclosure, or access where it is being denied, there is no jurisdiction vested in that Court to direct the precise manner in which the prosecutor meets such obligations, nor the resources which must be directed to this task.*

(xxiii) [*sic*] *Having made his initial orders in consideration of the practical difficulties arising from the quarantine regime, the learned trial judge acted irrationally in declining to revisit the matter once proposals to meet this matter had been identified and where was a fresh possibility that inspection could be performed within a domestic setting.*"

7. The detective garda sergeant referred to in the statement of grounds has sworn a grounding affidavit that echoes and amplifies upon the statement of grounds. The court has also seen, *inter alia*, a transcript of the leave proceedings.

8. There was suggestion that the State parties in this case did not wish to conform with the orders that were issued by the learned Circuit Court judge and that there is impropriety presenting in this regard. Is there a period following the making of an ostensibly lawful order when the State, by not acting in conformity with same (because it intends to seek judicial review of same), actually acts in breach of the ostensibly lawful court order? Unless the order is time specific (*e.g.*, 'do this by 1st June' and the leave application is only brought on 2nd June) then no, it does not seem to the court that there is any breach presenting. But if the order is time specific (*e.g.*, 'do this by 1st June' and the leave application is only brought on 2nd June) then there is a period in which the State is in breach. Here, the court understands that an ostensibly lawful Circuit Court order requiring compliance by 16th June remains not complied with and that the State intends not to comply with it in advance of the return date. In those circumstances, although this point was not raised at the hearing of the application to lift the stay, it seems to the court that it should add to the orders made by the leave judge an order staying the orders of the Circuit Court that are intended to be the subject of the judicial review proceedings. Otherwise the State will, at least for a period, be in breach of ostensibly lawful court orders in circumstances where leave may or may not be granted and where the State may or may not succeed in obtaining an order quashing the orders that it seeks to impugn in the intended judicial review proceedings, a situation which, even if it presents only on an interim basis, would seem to this Court to involve an affront to the rule of law that cannot be countenanced.

9. The court also has before it an affidavit sworn on 12th July by a solicitor acting for Mr X in which that solicitor avers, *inter alia*, as follows:

> "*2.* *I make this affidavit on behalf of the First Named Notice Party for the purposes of grounding the said Notice Party's application to this…Court for the removal of a stay on a disclosure order and criminal proceedings due to be heard by…*[the Circuit Court later this month].
>
> *3.* *I say that the said application is necessitated by the inclusion of a stay in an order whereby the Applicant sought leave to proceed by way of judicial review on 21st June 2021, of a direction of* [stated Circuit Court Judge]*…that the Applicant herein, the DPP, provide a copy of the hard*

drive of a computer seized from the First Named Notice Party in order that the contents of the said hard drive may be examined by expert witness on behalf of the defence in the criminal proceedings described above.

4. *I say that Mr Justice Meenan, upon hearing the said application to proceed by way of judicial review, adjourned the said hearing to 12th October 2021 and directed that the Notice Parties be put on notice of the said application….*

5. *I say that the first named notice party herein seeks to have the stay granted on the leave application set aside on the grounds that the Applicant did not bring to the attention of the leave judge, Mr Justice Meenan, essential information which would have made the grant of that stay highly unlikely and would have given rise to a substantial risk that the leave application would have been refused.*

6. *I say that the transcript of the leave application is not to hand at the time of the swearing of this affidavit; however, I say and believe that in the leave application, the statement of grounds and the affidavit, and the submissions of counsel did not adequately address important matters, including the impact of delay in the trial and the stress being suffered by the Notice Party, and contended delay on the part of the Applicant. I say that in the written submissions relied on in the application to set aside the stay, the notice party referred to the Applicant having been furnished with the Notice in advance of the leave application but in the oral hearing before Mr Justice Barrett* [the brief hearing at which yesterday's fuller hearing was scheduled] *counsel for the Applicant stated that the Notice was not sent to the solicitors for the Applicant until approximately 3pm which was either after or at most during the application for leave. I say that I have checked the records of my office and it does appear that the Notice of Grounds of Opposition and*

associated affidavit were only sent to the solicitors for the Applicant at 3.06pm on 21/6/21….

7. *I say and believe that counsel for the Applicant in the course of the leave application acknowledged that the transcripts of various appearances in the Circuit Court concerning the disclosure of exhibits in the trial of the first named notice party in various appearances in the Circuit Court would provide a comprehensive understanding of the proceedings and the submissions made by the parties and also acknowledged that there would be an issue as to the nature of the impugned order of* [the Circuit Court judge]*...and whether it is a mandatory order or otherwise.*

8. *I say and believe and am advised that by virtue of the Applicant's duty of* uberrima fides *in the* ex parte *application, that a particular onus was on the said Applicant to bring to the attention of the leave judge the matters identified in this affidavit. I say that the issue giving rise to the application for judicial review concerns affording the first-named party access to a computer which is alleged to contain certain images contrary to the provisions of the Child Trafficking and Pornography Act 1997. The first-named notice party has at all times contested the allegations made against him. The Applicant in the prosecution of the criminal proceedings currently pending before the* [Circuit Court]*...has refused to follow the direction of the* [stated Circuit Court judge] *that the defence should be furnished with a copy of the computer hard disk in order to allow access to the alleged images by experts on behalf of the notice party/defendant in the criminal case in his trial pending before the Circuit Criminal Court on* [stated date]*....The said computer and the contents thereof are exhibits in the matter pending before the Circuit Court. The examination of the computer or a bit for bit copy of the hard disk is essential to the*

defence of the Notice Party/Defendant. Direct access to the computer by defence expert witnesses has been denied by virtue of the public health emergency which has prevented such experts from travelling to Ireland from [stated jurisdiction] to examine the computer in situ at the Garda National Cyber Crime Unit in Dublin. The Applicant has refused to comply with the orders of [stated Circuit Court judge] *that a copy of the computer hard disk be furnished to the Defence. The details of that matter are set out as follows.*

9. *I say that on 19/5/21* [the Circuit Court judge]*...said in response to prosecution counsel who asked that before an order was made, he might have until the following day to call a Garda witness, 'I have decided for fairness and a proper trial they're entitled to a copy of the hard drive'. Defence counsel requested a deadline and the judge said 'you must give it to him by the 2nd of June'. Defence counsel had earlier told* [the Circuit Court judge]*...that the Notice Party is suffering from depression as a result of the stress of the prosecution.*

10. *I say that on 19/5/21, when Senior Counsel for the notice party went back in to address* [the Circuit Court judge]*...explicitly requesting that the order should be framed as an order that it is necessary for the proper preparation and conduct of the defence for the copy to be handed over rather than a direction to hand over; and that* [the Circuit Court judge] *stated that he had made an order that the hard drive 'should be handed over on the basis of a fair trial.'*

11. *I say that on 2/6/21, prosecution counsel characterised his application as an application to adjourn the trial, but it was submitted by the defence that in reality this was an application to set aside the order. The statement of grounds…states that* [the Circuit Court judge]*…did not*

refer to the Applicant's concerns that a breach of the undertaking by [stated consultants]*...would no longer be amenable to Garda control since the exhibit copy would have left the State. However, the Garda witness confirmed that* [stated consultants] *had security clearance to handle such material from* [stated jurisdiction's]*...police forces; and when the proposed protocol or undertaking was put to him, he responded by indicating that sending the material outside the State was 'in contravention of the Act'…and the judge referred to any apprehension that* [stated consultants]*...would re-distribute the material and in that context referred to the fact that they are certified by the authorities in* [stated jurisdiction]*...and are a recognised firm in this jurisdiction….*

12. *I say that on 2/6/21, further, defence Senior Counsel addressed the nature of the order and the consequences of a refusal to comply with same and submitted that the judge had jurisdiction to declare that the copies should be made and handed over because it is necessary for the proper conduct and preparation of the defence and the judge responded by saying 'That's what I have said.' Defence counsel submitted that the consequence of a failure to comply with that order would be a direction of 'not guilty'.* [The Circuit Court judge]*...agreed that could happen and said that it would be a very serious matter if the prosecution did not comply with the order; and indicated that the court would consider the appropriate sanction if sanction were needed. When defence counsel attempted to address the form of order prosecution counsel intervened to say 'The court has made the order. I think my friend is directing the court to make the order…and lecturing the court on it.'…*

13. *I say and believe that although I await sight of the transcript of the leave application the failure by the Applicant in the leave application (who was not represented by the counsel*

for the prosecution before [the Circuit Court judge]*...) to bring the matters set out above to the attention of the leave judge is a matter of considerable significance: that defence counsel had repeatedly sought to have the order framed as a declaratory order rather than as a mandatory order; and that prosecution counsel had made no such effort and indeed had interrupted defence counsel during efforts to ensure the order was in the appropriate form….*

15. *I say that on 15/6/21, prosecution counsel attempted to make his application before* [a second Circuit Court judge]*...before defence counsel could make his preliminary objection to the application being made to any judge other than* [the first Circuit Court judge]*...on the grounds that it was inappropriate to ask another [Circuit Court] judge to vary or put a stay on* [the first Circuit Court judge's]*...order, in particular since* [the first Circuit Court judge]*...had already refused a similar application. Having heard counsel for the prosecution,* [the second Circuit Court judge]*...indicated agreement with defence counsel that the application should be heard by* [the first Circuit Court judge]….

16. *I say that on 16/6/21,* [the first Circuit Court judge]…*made a formal statement that the Applicant should not have asked another Circuit Court judge to set aside his order and that the Applicant should have complied with the order, which had been made originally on 19/5/21 and said that it was not appropriate for the Applicant to seek to set aside his order in the Circuit Court.*

17 *....It is noted that the statement of grounds does refer to the fact that* [the first Circuit Court judge]…*indicated that the Applicant had a remedy elsewhere if the Applicant was dissatisfied with the order; the Affidavit grounding the application refers to the fact that* [the second Circuit Court judge]*...deferred to* [the first Circuit Court judge]*...and it*

is noted that counsel for the Applicant in the leave application did refer to [the first Circuit Court judge]*...being annoyed that the application had been made in the first instance to another* [Circuit Court] *judge; however, I say and believe this was not sufficient having regard to the fact that the Applicant was contending that* [the first Circuit Court judge]*...had acted irrationally.*

18. *I say and believe that in the above circumstances the stay imposed as part of the order adjourning the substantive application to proceed by way of judicial review in effect amounts to allowing the Applicant to achieve the purpose of the substantive proceedings, that is to prevent the trial of the Notice Party/Defendant proceeding on its scheduled date* [later this month]*...and to set at nought the disclosure order. A stay on the criminal proceedings also insulates the Applicant from the potential consequences of her failure to comply with the orders of* [the first Circuit Court judge]*...and prevents the Notice Party/Defendant from seeking a ruling of a trial judge that, in being denied access to the evidence in the case, the Notice Party/Defendant is entitled to a directed verdict of 'not guilty' of the charges brought against him.*

19. *Accordingly, I pray…for an order lifting the stay on the criminal proceedings and on the disclosure order*". [Court Note: The court does not see that the order of the leave judge of 21st June 2021 explicitly stays the disclosure order; rather point 4 of the curial section of the order stays Mr X's trial; however, point 19 of the defence solicitor's affidavit suggests that the defence (rightly) sees a stay on the criminal proceedings to include a stay on the disclosure order, being an order made in the course of those proceedings].

10. It is not possible in the timeframe in which this judgment is being generated to embark upon a comprehensive consideration of applicable law. Two cases which are representative of the obligations incumbent on counsel in *ex parte* leave applications are *Dean v. DPP* [2008] IEHC 87 and *McDonagh v. District Judge Anne Watkin & Ors.* [2013] IEHC 582.

11. In *Dean v. DPP*, certain statements were made by the applicant to the Gardaí that Hedigan J. considered ought to have been drawn to the attention of the leave judge but were not. This prompted Hedigan J., at p.2 of his judgment, to give his imprimatur to the following observation in *Delany and McGrath on Civil Procedure*, which now appears at para. 31-106 of the fourth edition:

> "*It is important to emphasise that, given that the application for leave is made* ex parte*, the applicant has a duty of* uberrimae fides*,* i.e. *utmost good faith, and must put all relevant factual and legal matters before the court even if they do not support the grant of leave*".

12. The just-quoted text is followed by a reference to the following observation in *Adams v. Director of Public Prosecutions* [2000] IEHC 45, at paras. 64-65:

> "*On any application made* ex parte *the utmost good faith must be observed, and the Applicant is under a duty to make a full and fair disclosure of all of the relevant facts of which he knows, and where the supporting evidence contains material misstatements of fact or the Applicant has failed to make sufficient or candid disclosure, the* ex parte *order may be set aside on the that very ground…*
>
> *The obligation extends to counsel. There is an obligation on the part of counsel to draw the judge's attention to the relevant Rules acts or case-law which might be germane to his* [or her] *consideration. That is particularly so where such material would suggest that an order of the type sought ought not to be made.*"

13. In a similar vein to *Adams*, in *McDonagh v. District Judge Anne Watkin & Ors.* [2013] IEHC 582, Kearns P. was confronted with a case in which the leave application was (unlike here) "*treated in a casual or off-hand manner*". Notably, although Kearns P. twice references

a duty of *uberrimae fidei* (utmost good faith) in his judgment in *McDonagh*, he refers six times to the duty arising for a moving party in a leave application as a duty of candour. Indeed, Kearns P., at para.16, appears even to shrink from a duty of candour referring at one point to how "[a] *lack of candour, and certainly one in respect of a material fact may have…consequences*".

14. If the courts are to subject moving parties/practitioners to an exacting standard when bringing leave applications it is necessary that the courts be thoroughly clear as to exactly what that standard is. *McDonagh* suggests that a duty of *uberrimae fidei* presents, then appears to reduce that to a duty of candour, and then appears to reduce matters still further to a duty of candour in respect of material facts only. Likewise, *Adams* refers to "*utmost good faith*" and then immediately attenuates that concept through the introduction of materiality as a criterion ("*material misstatements*"), also referring, for example, to "*sufficient…disclosure*", which also seems to depart, at least to some extent, from the concept of "*utmost good faith*", at least as that concept is understood in the field of insurance law (the area of law which has seen the greatest amplification on what a duty of *uberrimae fidei* involves).

15. Additionally, a degree of practicality falls in any event to be brought to bear. *Ex parte* applications come packaged in the form of a motion, a statement of grounds, and a grounding affidavit with or without exhibits. So there will necessarily be some level of distillation in the presentation of the facts and applicable law to the judge to whom application for leave is made, *i.e.* some detail will inevitably be lost in the making of the application, and properly so if applications are to be accommodated within the constraints of court time. The lawyer who moves a leave application cannot be expected to go through every last jot and tittle of the applicable facts and law and seems unlikely to be thanked if s/he does.

16. Having regard to applicable case law and to the considerations iterated above, it seems to this Court that a moving party, and the lawyer who moves an application for the moving party in a leave application, are more properly described as subject to a duty of disclosure, *i.e.* a duty to do their best (a) to ensure that the judge to whom a leave application is made gets a full and proper grasp of the facts, issues, and law in play in the proceedings in respect of which leave-to-bring is sought and (b) not to conceal anything that they consider ought, even if just in abundance of prudence, to be disclosed to the judge to whom application is made, (c) all of the foregoing obtaining within a human system of justice that must bring some degree of tolerance to instances of innocent human error that occur as regards the detail provided to a judge of

whom leave is sought. All that said, the parties here are agreed that a full-blooded duty of *uberrimae fidei* applies to the moving party in a leave application and that, therefore, is the test that the court has brought to bear in determining the within application.

17. Returning from a consideration of case law to the application at hand, a number of observations might be made:

(i) this is not an appeal or reconsideration of the decision of the leave judge to make the *ex parte* application returnable on notice to next October. Rather, it is an application to set aside the stay element of the order of 21st June on the contended-for basis of material non-disclosure. But, with respect, the court sees no material non-disclosure to present. Yes, the statement of grounds and supporting affidavit do not go into every twist and turn of what happened in the Circuit Court. However, as touched upon above, some level of distillation (abstraction) of fact is inevitable in the formulation of a statement of grounds and supporting affidavit and the presentation of matters to the judge to whom application for leave was made. The court respectfully sees no issue to present in terms of what the leave judge was told here (or apprised by way of the documents before him).

(ii) the court was surprised to read the suggestion in the written submissions for the DPP that "[A]*n ex parte application proceeds on the assumption that the judge who is hearing it has had an opportunity to read the papers in advance*". There is, with respect, no such assumption and a barrister/solicitor when moving a leave application should proceed to open the matter fully to the judge to whom application is made unless that judge indicates that s/he has read the papers and that a more streamlined approach may be adopted. *Ex parte* applications sometimes come on at short notice and it is not always the case that a judge will have read the papers in advance. However, it appears that the present case *was* one where there was longer 'run in' to the application and hence time for the leave judge to read the papers. The papers are properly comprehensive, and it is clear from the questions posed by the leave judge that he had read them.

(iii) to the extent that it is suggested (and the court is not sure that it is or continues to be suggested) that there was any delay on the part of the DPP in seeking leave to bring the within proceedings, the leave application was brought within time. If there is a complaint (and there seems to be some complaint) that there has been prosecutorial delay in the

criminal proceedings to which the leave application relates, the within application is not one in which that contention can properly be advanced or decided.

(iv) there is obviously a view on the part of Mr X's lawyers that something else/more might have been said to the leave judge at the *ex parte* leave application but that they are possessed of that view is, with respect, not determinative of matters. The test is whether there was any breach of the duty incumbent upon a moving party (and the moving party's lawyers) in moving a leave application and the court cannot over-emphasise that it sees no such breach to present in this case.

(v) specific complaint was at one point made that counsel for the DPP did not refer to certain documentation which has since been shown not to have been sent to the DPP until after counsel for the DPP had risen to his feet and commenced his application for leave. Maybe there are and/or will be cases in which documentation that is belatedly sent/received might nonetheless get a mention by the moving lawyer if her/his solicitor realises what has happened and tells her/him; but this was not such a case and there is nothing untoward in the fact that this documentation did not get a mention by counsel for the DPP. (Indeed, it is not entirely clear that complaint continues to be made in this regard; to the extent that it is, with respect, an unjustified complaint).

(vi) specific complaint was made that the issue of a mandatory versus a directory order by the Circuit Court was not flagged by counsel for the DPP before the leave judge. This, with respect, is just not correct. It was flagged several times by counsel for the DPP.

(vii) specific complaint was made that the full verbal exchanges before the Circuit Court (accessible via the Circuit Court DAR) were not placed before the leave judge. Two points might be made in this regard. First, counsel for the DPP indicated that they would be placed into evidence in due course (once permission was obtained and it has now been obtained). Second, if the leave judge thought that the absence of this evidence ought to be remedied before he proceeded further or, alternatively, that its absence justified his refusing leave, he would doubtless have acted accordingly. (The same two points can be made as regards any complaint that parts of the verbal exchanges before the Circuit Court were not placed before the leave judge).

Conclusion

18. Bringing a full-blooded *uberrimae fidei* (utmost good faith) test to bear as regards the actions of the DPP (and her lawyers) in this application, the court considers that the DPP and her lawyers have handsomely met the obligations that such a test demands of the *ex parte* applicant. The leave judge was placed by the DPP in a position where he had a full and proper grasp of the facts, issues and law at play. Additionally, the court does not see that any of the points that counsel for Mr X has pointed to as having been missing from the leave application would have altered how matters have proceeded.

19. For all of the various reasons stated, the court respectfully declines to lift the stay order. However, for the reasons stated above, the court proposes (i) to vary the stay order so that instead of stating "*a stay on the trial of the Applicant herein pending the determination of these proceedings*" it instead states "*a stay on the trial of the first-named Notice Party herein pending the determination of these proceedings*"; and (ii) to add to the orders made by the leave judge an order staying the Circuit Court orders that are intended to be the subject of the judicial review proceedings pending the determination of same.